***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLEE

74-1273

To be argued by:
MARGERY EVANS REIFLER

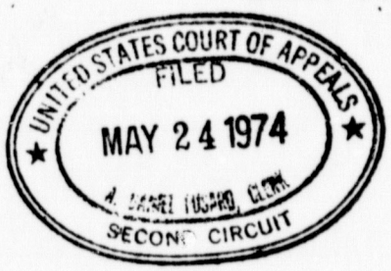
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED STATES OF AMERICA ex rel. :
SEBASTIAN ROSSILLI,
:
Petitioner-Appellant,
:
-against-
:
J.E. LAVALLEE, WARDEN,
:
Respondent-Appellee.
----------X

[APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK]

BRIEF FOR RESPONDENT-APPELLEE

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UNITED STATES COURT OF APPEALS
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SEBASTIAN ROSSILLI,

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Docket No.
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-against-

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BRIEF FOR RESPONDENT-APPELLEE

## Questions Presented

1. Did the District Court correctly hold that petitioner's right to confrontation was not violated by the use at trial of an absent witness's prior recorded testimony, when the prosecution had used due diligence and good-faith in its efforts to locate the witness?

2. When petitioner introduced new affidavits regarding the witness's whereabouts at trial, did the District Court correctly hold that the evidence was not newly discovered and that, in any event, it was not relevant to the issue of the due diligence exercised by the prosecution at the time of trial?

## Statement

This is an appeal from two orders of the United States District Court for the Eastern District of New York which denied petitioner's applications for habeas corpus relief. Petitioner's original application challenged as violative of his right to confrontation the introduction at trial of the prior recorded testimony of a witness who was unavailable at the time of trial. Petitioner claimed that the prosecution had failed to use due diligence in seeking to locate the missing witness. The District Court (Zavatt, J.) found that the due diligence requirement had been met and denied the application in an order dated June 17, 1970.

Before the appeal of that order was perfected, this Court remanded the case to the District Court to await the outcome of newly instituted state court proceedings, granting petitioner leave to move to introduce newly discovered evidence in the District Court. Petitioner so moved in the District Court under § 60(b) of the Federal Rules of Civil Procedure, seeking to indroduce affidavits from the missing witness and his wife, which went to the issue of the witness's availability at the time of trial. In an order dated November 30, 1973 the District Court (Mishler, J.) dismissed the petition, holding

that the evidence which petitioner sought to introduce was not newly discovered and that, in any event, the evidence did not controvert the earlier finding that the prosecution had used due diligence in attempting to locate the witness for trial.

## Facts

Petitioner is presently confined at Clinton Correctional Facility Dannemora, New York, pursuant to a judgment of conviction for the crimes of robbery in the first degree, burglary in the second degree, grand larceny in the first degree, and five counts of assault in the second degree. The judgment of conviction was rendered by the Nassau County Court (Young, J.) after a trial by jury. On March 22, 1967 petitioner was sentenced as a second felony offender to terms of 18 to 30 years (robbery(, 15 - 25 years (burglary), 10 - 20 years (grand larceny), and 5 - 10 years (for each count of assault), the sentences to run concurrently.

## I. FIRST STATE COURT PROCEEDINGS

### A. Pretrial Proceedings

The charges brought against petitioner arose from an armed robbery which occurred in Atlantic Beach, Nassau County on January 11, 1965. Three men gained entry into the home of Mrs. Sydelle Marcus by means of a ruse. Mrs. Marcus and her maid were assaulted and expensive jewelry was taken from the house and Mrs. Marcus's person. Mr. William Brown, a neighbor's chaffeur, was seeking entry into the house while the robbery was in progress. He observed the flight of the three men from the house and was actually detained for a few minutes by one of the men, who held a gun to his head. Three boys in the nieghborhood also observed the flight of the three robbers.

Pursuant to § 190 of the New York Code of Criminal Procedure* a felony (probable cause) hearing was conducted on February 5, 1965. Mr. Brown identified petitioner as the robber who held a gun to his head. He was "absolutely sure" of petitioner's identity. Mr. Brown had spotted petitioner in



* Now §§ 180.10(2) and 180.60 of the Criminal Procedure Law.

a courtroom hallway four days before the hearing and pointed him out to the police as his assailant. Mr. Brown was extensively and vigously cross-examined by petitioner's attorney (A 17-32).* Mrs. Marcus also testified at the felony hearing.

B. The Due Diligence Hearing.

On the day that the trial was called, the prosecution informed the Court that it intended to offer Mr. Brown's testimony from the felony hearing because he was unavailable for trial. Section 8(3) of the Code of Criminal Procedure (McKinney's Supp. 1970),** allows the introduction of such testimony if it is "satisfactorily shown to the court. . .that the witness cannot with due diligence be found in the state." The trial court thereupon conducted a hearing to determine if the State had used due diligence in seeking to locate Mr. Brown (the due diligence hearing, T. 2-91).***



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* All numbers in parantheses preceded by the letter "A" refer to the Appendix submitted to this Court by petitioner.

** Now § 670.10 of the Criminal Procedure Law.

*** All numbers in parantheses preceded by the letter "T" refer to the state court transcript submitted to this Court as an exhibit.

Leonard Fabian, a process server employed by the Nassau County District Attorney, testified to the efforts made by his office to locate William Brown (T. 5-15, 32-34, 39-54). Mr. Brown was served with subpoenas twice in 1965 at a Park Avenue address given by him as his place of employment. In 1966 a subpoena was issued for him at that address but he was no longer employed there. No other address was given by his employer. Phone calls and additional subpoenas were of no avail.

An address for Mr. Brown at Trinity Avenue in the Bronx was discovered but Mr. Brown could not be located there. Phone calls to two numbers given by Mr. Brown were unsuccessful. In all, five subpoenas and numerous phone calls were made. Contact with the post office yielded no information.

Detective Carman Altomare of the Nassau County Police Department was in charge of petitioner case (T.15-20, 74-80). He received a phone call from the District Attorney's office asking for his help in locating Mr. Brown, whom he knew. Mr. Altomare had the Park Avenue and Trinity Avenue addresses for Mr. Brown. He called the employer and was informed that Mr. Brown no longer worked there and that there was no forwarding address.

He called the Bronx phone number he had for Mr. Brown and was told that Mr. Brown was no longer there and that there was no forwarding address. Mr. Altomare had the Board of Elections check its records for a ten year period, with negative results. The telephone directory was of no avail.

Mr. Altomare vistied the Trinity Avenue address with a Detective Koehler. The superintendent of the building stated that a Brown lived on the fourth floor of the building but that he wasn't sure it was a William Brown. The detectives went to that apartment and spoke to a Louise Brown. She told them that her husband had not been living there since 1965 when he had left her due to marital difficulties. She had received many calls from the police and District Attorney's office regarding Mr. Brown and had told them that she would notify them if she learned Mr. Brown's whereabouts. The detectives requested that she call them if she received any information.

Detective Edward Koehler of the Nassau County Police Department also testified (T. 20-24). Mr. Koehler testified that he contacted the telephone company business office and was told that they had no number for a William Brown at the Trinity Avenue address. The lighting company had no record of a William Brown. Neither the postal department for that area or the mail carrier for that route were able to provide any information regarding a William Brown at that address or a forwarding address for him. A call made to a William Brown at the address was answered by a Mary Brown. Mary Brown said that she was not a relative of William Brown's but that she knew him and had not seen him for three months.

Walter Voolens, a process server with the District Attorney's office, testified regarding his efforts to locate William Brown (T. 55-74). Mr. Voolens had twice served Mr. Brown at the Park Avenue address in 1965. In 1966, he attempted to serve Mr. Brown there and was told he left his job. Mr. Voolens was unable to check out phone numbers where Mr. Brown purportly could be reached.

Mr. Voolens learned of the Trinity Avenue address and attempted to serve Mr. Brown there. The mail boxes at that building had no names on them. A custodian or superintendent in the basement told Mr. Vollens that he had never heard of William Brown, and that there was more than one family in some of the apartments. Mr. Voolens began to ring each bell on the first few floors but received no cooperation from the tenants.

Mr. Voolens than spoke to the mailman who stated that he could not recall a William Brown or any mail for him. Undaunted, Mr. Voolens spoke to the superintendent to the building next door, who knew of no William Brown. Mr. Voolens did not see William Brown in the neighborhood and no one had heard of him.

Oral argument from counsel was heard. On the following day the court ruled that due diligence had been shown and allowed the admission of the testimony (T. 205-206).

C. The Trial.

At the trial Mrs. Marcus testified to the events which occurred on January 11, 1965. She was unable to identify her assailants. Her maid was not available to testify.

William Brown's felony hearing testimony was then introduced. He had testified to the events which occurred on January 11, 1965, and to his subsequent identification of petitioner in a courtroom hallway. Mr. Brown was "absolutely sure" that petitioner was the man who held a gun in his face. He was able to describe in detail the clothes which petitioner wore on the day of the robbery. He also testified that petitioner did not wear glasses, was clean-shaven, and held a dark revolver. He approximated petitioner's height and stated that petitioner had said to him "don't move." He "got a good look" only at the man who held him with a gun for a few minutes. He did remember that the other two men wore trench coats and hats.

Brian Barto, one of the boys in the neighborhood during the robbers' flight, testified that he recognized petitioner as one of the men whom he saw on that day. There was no question in his mind as to petitioner's identity. He had observed petitioner running toward and then by him. Mr. Barto had previously identified the petitioner in a lineup (T. 158-198).

John Patrick Swift, another of the boys who was in the neighborhood on the day of the robbery, also testified (T. 209-232). Mr. Swift identified petitioner as one of the men he had seen running toward him on that day. He had a good look at petitioner's face. Mr. Swift had previously identified petitioner in a lineup.

William Henderson, the third of the trio, testified that he hadn't taken particular notice of the three men running down the street on the day of the robbery. He was unable to identify petitioner as one of the men that he'd seen on that day (T. 235-243).

The defense called petitioner's mother-in-law (T. 247-274) who testified that petitioner was at home on the day of the robbery. She stated that she had not discussed her testimony or any of the specific activities on that day with her daughter,

petitioner's wife. Petitioner's wife (T. 274-287) testified to the same facts as the mother-in-law regarding petitioner's presence at home on the day of the robbery. However, in direct contradiction to her mother's testimony, she testified that she had discussed her testimony with her mother on numerous occasions. Moreover, both witnesses testified that petitioner had carried his wife downstairs to see a Dr. Tester about her foot injury on that day. Petitioner's wife testified that petitioner was with her during the doctor's visit. The doctor's visit occurred at approximately the same time as the robbery. The doctor was not called to testify.

The jury was then charged and sent out to lunch. Deliberation began after lunch and verdict was returned by 3:35 p.m.

D. The Appeal

Petitioner's judgment of conviction was affirmed by the Appellate Division (People v. Rossilli, 30 A D 2d 815 [2nd Dept. 1968]) and leave to appeal to the Court of Appeals was denied. His petition for certiorari was denied by the United States Supreme Court. Rossilli v. New York, 396 U.S. 865 (1969).

## II. FIRST FEDERAL PROCEEDINGS

### A. District Court Proceedings

Petitioner then filed a petition for habeas corpus in the District Court. He claimed that he was denied his right to confrontation at trial by the introduction of Mr. Brown's felony hearing testimony when due diligence had not been exercised in locating the absent witness.* Reviewing the due diligence hearing evidence, the District Court (Zavatt, J.) denied the application on June 17, 1970. The Court held that the record fairly supported the factual finding of due diligence, as well as the United States Supreme Court's requirement of a good-faith effort to secure the witness's presence at trial.

### B. Court of Appeals Proceedings

This Court granted petitioner's motion for a certificate of probable cause and the assignment of counsel. Before the appeal was perfected, petitioner filed coram nobis applications in the trial court (discussed below), seeking to vacate the judgment of conviction on the basis of newly discovered evidence. This Court then granted petitioner permission to



* Petitioner also claimed that portions of the state proceedings were missing from the transcript. This claim was rejected by the Court and has not been raised on appeal.

withdraw the appeal and remanded the case to the District Court to await the outcome of the state court proceedings and with leave to move in the District Court to introduce newly discovered evidence.

III. SECOND STATE COURT PROCEEDINGS

Petitioner filed two coram nobis petitions in the trial court, seeking to vacate the judgment of conviction on the basis of newly discovered evidence. The first application included an affidavit from Mr. Brown which stated that he had lived at his present address for numerous years with his wife, and had been in Florida on business on the date of trial. He stated that his wife knew his whereabouts at all times and that he was in constant communication with him. At no point had he and his wife quarreled to the point of separation (A. 41).

The trial court (Young, J.) denied petitioner's application (A. 42-43) and the denial was affirmed on appeal 38 A D 2d 894 (2d Dept. 1972). Leave to appeal to the Court of Appeals was denied.

Petitioner's second petition included an affidavit from Mr. Brown's wife, Mary Brown, who stated that she and Mr. Brown had lived at their address for numerous years and

that Mr. Brown was in Florida on business in January, 1967. Mrs. Brown knew her husband's address and was in constant communication with him. There were no marital difficulties and they were not separated. Mrs. Brown stated that she had been contacted by a Nassau County Detective during the period of Mr. Brown's absence and told him that Mr. Brown was temporarily in Florida. Mrs. Brown also stated that a different Mr. & Mrs. William Brown lived on the same floor of a building physically connected to her residence (A. 44). This second coram nobis application was denied (A. 45-49). Due to an intervening change in New York law, permission to appeal the denial was necessary. Permission was denied.

IV. SECOND FEDERAL COURT PROCEEDINGS

A. District Court

After the completion of these state court proceedings, petitioner renewed his habeas corpus application in the District Court, moving under § 60(b) of the Fed. R.C.P. to introduce newly discovered evidence (A. 33-51), to wit, the affidavits of Mr. & Mrs. William Brown which had been introduced in the state courts (A. 33-51). In addition to these two affidavits, an affidavit from petitioner's wife was submitted (A. 50-51).

Mrs. Rossilli stated a lack of money had prevented her from hiring an investigator until late 1970 or early 1971. The investigator located William Brown at his given address and Mr. Brown was eventually persuaded to give an affidavit. Over a year later, an affidavit was obtained from Mrs. Brown.

The District Court (Mishler, J.) dismissed the renewed petition on November 30, 1973. The Court found that the evidence which petitioner sought to introduce was not in fact newly discovered. Petitioner had an opportunity to discover it at the time of the due diligence hearing. The Court rejected the claim that this evidence was unavailable through lack of funds as "specious"; a subway ride to the Bronx would have yielded the same information.

The Court stated that the factual finding of the state court must be accorded great weight, 28 U.S.C. § 2254(d); La Vallee v. Rose, 410 U.S. 690 (1973). The test of due diligence had to be made in light of the facts which existed at trial, not in light of subsequent events. Considering the newly submitted evidence, the Court held that later proof of Mr. Brown's whereabouts is not relevant if the information was unavailable at the time of trial. This later evidence does not prove a lack of due diligence at the time of trial. The prosecution met the test at that time.

## POINT I

WHEN THE PROSECUTION USED DUE DILIGENCE AND GOOD FAITH IN ITS EFFORTS TO LOCATE A MISSING WITNESS, PETITIONER'S RIGHT TO CONFRONTATION WAS NOT VIOLATED BY THE USE AT TRIAL OF THE ABSENT WITNESS'S PRIOR RECORDED TESTIMONY.

The District Court in this case correctly upheld the state court's finding that the prosecution used due diligence and good faith in its efforts to locate the witness who was unavailable for trial. This requirement having been met, petitioner's right to confrontation was not violated by the introduction of the witness's testimony from an earlier hearing at which he had been subject to cross-examination. The use of an unavailable witness's prior recorded testimony is a well-established exception to the confrontation requirement, unavailability being tested by the prosecution's good faith effort to obtain the witness's presence at trial. Barber v. Page, 390 U.S. 719 (1968).

In New York State, this good faith effort is determined at a due diligence hearing conducted by the trial court.* The factual finding of a state court after such a hearing is entitled to a presumption of correctness in a habeas corpus proceeding. 28 U.S.C. § 2254(d); La Vallee v. Delle Rose, 410 U.S. 690, 691-692 (1973). This presumption can only be overcome if



* Code of Criminal Procedure § 8(3), now § 670.10 of the Criminal Procedure Law.

petitioner establishes one of the exceptions listed in 28 U.S.C. § 2254(d).

Petitioner relies on 28 U.S.C. § 2254(d)(8), alleging that the factual finding of the state court is not fairly supported by the record. This argument is totally without merit. The District Court conducted an extensive review of the state court record and concluded that the record "more than fairly supports the factual finding" of due diligence.

The determination of the due diligence or good faith exercised by the prosecutorial authorities "is a factual question to be determined in light of the circumstances in each case." Eastham v. Johnson, 338 F. Supp. 1278, 1281 (E.D. Mich. 1972). See United States v. Gordon, 246 F. Supp. 522, 525 (D.C.D.C. 1965). When the record in this case is reviewed, there can be no question that the District Court reached the correct conclusion.

Two process servers and two detectives testified to the numerous efforts made to locate William Brown, the missing witness. Attempts to serve subpoenas and numerous phone calls were made by the process servers to Mr. Brown's place of employment and residence. One of the process servers spoke to an employee at the Trinity Avenue residence, the mailman, and the superintendent of a neighborhood building. The two detectives

visited the Trinity Avenue address and spoke to the superintendent. They went to a fourth floor apartment in that building and spoke to a Louise Brown, the wife of a William Brown. Louise Brown stated that her husband had left her in 1965 and that she had no knowledge of his whereabouts. The detectives also contacted William Brown's last known employer; tried the phone numbers they had; and made inquiries of the Board of Elections, the telephone company, the postal department, the mailman, and the lighting company. (supra, at 5-9). It is hard to imagine a more exhaustive search for a missing witness.

In Eastham v. Johnson, supra, at 1281, the Court upheld the use of testimony of a missing witness when the prosecution spoke to her neighbors and landlord, talked to her relatives, and checked the school system to see if her children were enrolled there. In People v. Burton, 286 N.E. 2d 792, 796 (App. Ct. Ill. 1972), the Court upheld the use of prior recorded testimony of two unavailable witnesses when the authorities checked their last known addresses, spoke to people at those addresses, and made inquiries of election and postal officials. In Poe v. Turner, 353 F. Supp. 672, 675-76 (D.C. Utah, 1972), the Court

found due diligence when the authorities searched for a missing witness by checking at the place of his former employment; contacting the local sheriff, local driver license bureaus, and the State Motor Vehicle Department; and searching telephone listings.

Petitioner has no claim that the authorities made no efforts to obtain the witness, e.g. Wilson v. Bowie, 408 F. 2d 1105 (9th Cir. 1969), nor that the State refused to subpoena a witness whose whereabouts was known, e.g. Barber v. Page, supra; United States v. Edwards, 469 F. 2d 1362, 1368-69 (5th Cir. 1972). It would be fruitless to speculate on what further means might have been used in this case, as the prosecution is required only to use due diligence, not to pursue every conceivable source of information in New York City. See Poe v. Turner, supra at 676; United States ex rel. Oliver v. Rundle, 298 F. Supp. 392, 395 (E.D. Pa.), affd. 417 F. 2d 305 (3rd Cir. 1969), cert. den. 397 U.S. 1050, reh. den. 399 U.S. 938 (1970). The prosecution in the instant case did all, if not more, than is required to meet the test of due diligence and good faith in its search for William Brown. Petitioner is entitled to no more.

## POINT II

THE NEW AFFIDAVITS SUBMITTED BY PETITIONER DID NOT CONSTITUTE NEWLY DISCOVERED EVIDENCE; IN ANY EVENT, THE DISTRICT COURT CORRECTLY DETERMINED THAT THEY WERE NOT RELEVANT TO THE ISSUE OF DUE DILIGENCE EXERCISED BY THE PROSECUTION AT THE TIME OF TRIAL.

### A.

Petitioner reopened his habeas corpus proceeding by moving to introduce newly discovered evidence, to wit, the affidavits of William Brown and his wife, pursuant to Rule 60(b) of the Fed. R. Civ. P. The District Court held that the affidavits did not constitute newly discovered evidence since petitioner had the opportunity to discover the information at the time of the due diligence hearing.* Although petitioner was not required to produce evidence at the due diligence hearing, he was certainly entitled to do so. See Walker v. Bishop, 408 F. 2d 1378, 1385 (8th Cir. 1969); United States v. Roberts, 388 F. 2d 646, 648 (2d Cir. 1968). If the evidence later discovered at the Trinity



* The cases cited by petitioner in support of his claim that the affidavits are newly discovered evidence for a Rule 60(b) motion are inapposite (Petitioner-Appellant's Brief at 8.). Those cases specifically define newly discovered evidence which would warrant the granting of a new federal criminal trial, pursuant to the Fed. R. Crim. P.

Avenue address was not available to petitioner at that time, then it was ipso facto also unavailable to the prosecution and cannot later be used to attack the prosecution's due diligence at the time of trial (infra at 23 - 24 ). Moreover, the claim of petitioner's wife that the evidence was unavailable at an earlier date through a lack of funds is frivolous; a subway ride to the Bronx was all that was required.

Petitioner himself chose to reopen his habeas corpus proceeding by making a motion under Rule 60(b), presumably analogizing to Rule 60(b)(2) although he did not specify a subsection. See Harris v. Nelson, 394 U.S. 286, 294 (1969). Having chosen this analogy, petitioner should be subject to analagous strictures of that section, for example, the exercise of the due diligence in discovering the new evidence. E.g. Westerly Electronics Corp. v. Walter Kidde & Co., 367 F. 2d 269 (2d Cir. 1966). As mentioned above, the information discovered by a private investigator three years after the trial could have been ascertained at any earlier time by a subway ride to the Bronx. Petitioner himself certainly failed to make a duly diligent search for information which he insists was available at the time of trial.

In any event, motions made under Rule 60(b) are within the sound discretion of the trial court. E.g. Welden v. Grace Line, Inc., 404 F. 2d 76, 79 (2d Cir. 1968); Nederlandsche Handel-Maatschappij, N.V. v. Jay Emm, Inc., 301 F. 2d 114 (2d Cir. 1962). On appeal from denial of a motion to vacate a judgment under Rule 60(b), the only issue is whether the trial court has abused its discretion, Sampson v. Radio Corp. of America, 434 F. 2d 315 (2d Cir. 1970), since this Court "would be loath to substitute our judgment for that of the trial judge." Nederlandsche, supra at 115. There is no evidence that the District Court abused its discretion in refusing to vacate the earlier order denying [redacted] petitioner's habeas corpus petition.

B.

Moreover, contrary to petitioner's contention, the District Court did not refuse to consider the new affidavits.* The Court reviewed the affidavits and found that their contents did not overcome the earlier finding of due diligence; accordingly the petition was dismissed.



* A hearing on the contents of the affidavits was unnecessary as they were accepted as true for the purpose of the District Court's analysis.

Petitioner relied on the new affidavits to prove that William Brown had been temporarily residing in Florida and that his wife was at his Trinity Avenue residence and in communication with him. These facts are not relevant to the earlier finding of due diligence if they could not have been discovered by the prosecution at the time of trial. As discussed above (supra, Point I), the prosecution made extensive efforts to locate Mr. Brown and never discovered any of the facts later alleged.

Under petitioner's theory, any witness who was missing at the time of trial could later resurface, claiming that he had not been unavailable. But unavailability vel non is not the test. The test is only that a duly diligent search be made for the witness. If it is found that such a search has been made, post-trial proof of facts unavailable to the prosecution at the time of trial cannot upset the due diligence finding.

## CONCLUSION

THE DECISIONS OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Dated: New York, New York
May 24, 1974

Respectfully submitted,

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STATE OF NEW YORK )
: SS.:
COUNTY OF NEW YORK )

ROSALIN FANN , being duly sworn, deposes and says that s he is employed in the office of the Attorney General of the State of New York, attorney for Respondent-Appellee herein. On the 24th day of May , 1974 , She served the annexed upon the following named person :

Francis E. Koch, Esq.
Attorney for Appellant
51 West 51st St.
NY, NY 10019

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by for that purpose.

Rosalin Fann
ROSALIN FANN

Sworn to before me this
24th day of May , 1974

Deputy Margaret Evans Reifler
Assistant Attorney General
of the State of New York